In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 868

UNITED TRANSPORTS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing two actions (consolidated by the court for all purposes) to set aside orders of the Interstate Commerce Commission in two separate application proceedings.[1] The orders

[1] Appellants have reprinted in their jurisdictional statement only the Commission orders denying reconsideration in the two proceedings. The Commission's original orders in Docket

205-740—66——1

granted the petitions of Commercial Carriers, Inc. and Kenosha Auto Transport Corporation for certain limited modifications of their certificates. This appeal represents the third occasion on which this Court has been called upon to review judgments dismissing essentially indistinguishable certificate modification orders. *Motor Convoy, Inc.* v. *United States,* 235 F. Supp. 250 (N.D. Ga.), affirmed *per curiam,* 381 U.S. 436; *Convoy Company* v. *United States,* D. Ore., unreported, affirmed *per curiam,* Oct. Term, 1965, No. 719 (January 17, 1966).

Certificates authorizing interstate motor transportation of automobiles are generally limited either to "initial authority," which authorizes movements of new automobiles from manufacturing or assembly plants, or to "secondary authority," authorizing all other movements. Such classifications, however, reflect an older pattern of transportation of automobiles—transportation entirely by motor carriers. In recent years, this pattern has changed radically as the result of the advent of coordinated rail-motor service.[2] New automobiles now move from the manufacturing or assembly plant largely by rail for the line-haul movement, with the motor carrier portion of the transportation limited to the short hauls to or from the railroads.

No. MC–43038 (Sub-No. 404), *Commercial Carriers, Inc., Petition for Modification of Certificate* and Docket Nos. MC–30837 and 30837 (Sub-No. 185), *Kenosha Auto Transport Corporation, Petition for Modification of Certificate*, not reprinted in the jurisdictional statement, are reprinted in the appendix, *infra*, pp. 9–15.

[2] Trailer-on-flatcar service ("TOFC") and multi-level rail car service ("MLRC").

Responding to the changed situation, the Commission in *National Automobile Transporters Association, Petition for Declaratory Order*, 91 M.C.C. 395 (*NATA*), issued a comprehensive ruling clarifying the status of motor carriers in regard to coordinated rail-motor movements. The Commission first ruled that where the traffic leaves the point of origin by rail, a motor carrier holding initial authority is not authorized to perform the remaining motor portion of the movement, i.e., from the destination railhead to the consignee. Second, noting that the new pattern of rail-motor transportation of automobiles has caused a sharp decrease in the tonnage and revenues of motor carriers with initial-authority certificates, the Commission ruled that such a motor carrier might use an expedited procedure to secure a modification of its "initial authority" certificate permitting it to handle the motor portion of its own former traffic. But such modification—which could be secured upon a showing of the volume and routing of movements before and after the introduction of coordinated rail-motor service (91 M.C.C. at 415)—would be permitted "only to the extent necessary to enable a petitioner to continue to participate in the remaining motor movement [of its own former traffic], and not to encroach on the rights of other existing carriers" (*id.* at 416). The Commission expressed the hope "that such petitions can be disposed of with a minimum of expense and effort for all concerned, and perhaps without oral hearing" (*ibid.*).

The Commission's orders here in issue (J.S. App. A–3, A–4; and App., *infra*, pp. 9–15) granted the pe-

titions of Commercial Carriers, Inc., and Kenosha Auto Transport Corporation for a limited modification of their motor common carrier certificates pursuant to the *NATA* ruling. Commercial had been authorized under its certificate to transport new automobiles from the Cadillac plant in Detroit to points in Texas. This traffic now moves from the plant to destinations in Texas by rail; from there it moves by motor carrier. The modification permits Commercial to continue in competition for a portion of the traffic it has lost by authorizing it to carry from the rail destinations to the points in Texas it was originally certificated to serve. Under its certificate, Kenosha was authorized to transport trucks from the International Harvester plants at Ft. Wayne, Ind., Springfield, Ohio, and Bridgeport, Conn., to a 27 state area. The modification granted to Kenosha has a similar effect to that granted to Commercial.

The three-judge district court (with one dissent) sustained the Commission's orders, holding that the Commission had acted in accordance with the procedures and principles established in *NATA* and approved in *Motor Convoy* (J.S. App. A–1, pp. 22–24). The dissenting judge made no mention of *Motor Convoy,* but rested his dissent on points previously rejected in *Motor Convoy,* and more recently in *Convoy* (J.S. App. A–1, pp. 24–33).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The Commission's orders were issued pursuant to criteria and procedures originally upheld last Term by the

Court, *Motor Convoy, Inc.* v. *United States, supra,* and again in this Term, *Convoy Company* v. *United States, supra.* The principal legal and factual issues raised by appellants have been twice presented and decided.

1. Appellants argue (J.S. 7–9, 12–15) that the limited modifications granted Commercial Carriers and Kenosha to enable them to participate in coordinated rail-motor movements between the points named in their certificates should be treated the same as the grant of a *new* certificate of public convenience and necessity, and that the Commission, therefore, was required to conduct a hearing for the purpose of determining whether the new service was required by the shipping public and whether the services of the protesting carriers, such as appellants, were inadequate. However, as expressly held in *Motor Convoy,* the kind of limited modifications granted by the Commission here, restricted as they are to the precise traffic Commercial Carriers and Kenosha transported prior to the advent of coordinated rail-motor service,[3]

[3] Verified statements filed by Commerce Carriers and Kenosha and not disputed by appellants showed the volume and routing of the pertinent traffic transported by them from the origin points to destination areas both before and after the shift to coordinated rail-motor movement. The modifications granted by the Commission authorize Commercial Carriers and Kenosha, respectively, to transport automobiles and trucks in "secondary movements" from points in the destination areas to other points in such areas, but restrict the movements to such automobiles and trucks moving only from their previously certificated manufacturing plant origins and "having an immediately prior movement by rail"—thus strictly limiting Commercial and Kenosha to the remaining motor portion of their own former traffic (Appendix, *infra*, pp. 11–12, 14).

do not enable the carrier to institute a new service in competition with other carriers, and hence the standards for determining whether a new certificate should be issued are wholly inapplicable. "The need for the transportation by [applicant] had previously been established and [applicant] had already been supplying that need, and continued to supply that need just as before with the exception of the substitution of rail carriage in lieu of motor carriage for part of the way." *Motor Convoy, Inc.* v. *United States, supra,* 235 F. Supp. at 253. Carriers such as the present appellants "would not be affected by the situation" (*ibid.*), since the modifications merely permit Commercial and Kenosha to carry their own former traffic, not appellants' traffic, and create no new service to compete for appellants' traffic.

Appellants' invocation of hearing requirements of Section 7 of the Administrative Procedure Act, 60 Stat. 241, 5 U.S.C. 1006(c), adds nothing, since it depends upon the assumption rejected in both *Motor Convoy* and *Convoy,*[4] that a new service is created. Moreover, as the court below found, appellants, in their requests for oral hearing, neither controverted the evidence submitted with the applications nor

[4] Appellants argument as to the Administrative Procedure Act was explicitly made and rejected in *Convoy.* Appellants' contention (J.S. 9, 12) that the *NATA* decision, governing both the procedure and relevancy of the issues in these proceedings, was subsequently overruled in Ex Parte 230, *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301, was also raised and rejected in *Convoy.*

made any showing that they would produce testimony relevant to the pertinent issues in the light of the *NATA* decision (J.S. App. A–1, 23–24, 36–37). Since appellants had been afforded an opportunity to do this in their submissions, the requirements of fair procedure were fully satisfied. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205; cf., *Riss & Co.* v. *United States*, 117 F. Supp. 296, 301–302, 304 (W.D. Mo.), affirmed, 346 U.S. 890.

2. Appellants contend that the Commission's orders are deficient for lack of adequate findings as to public convenience and necessity (J.S. 7, 9) and for failure to state the factual basis of the decision as required by Section 8 of the Administrative Procedure Act, 60 Stat. 242, 5 U.S.C. 1007(b), (J.S. 12–14). Again, these same arguments were rejected in *Convoy* with respect to the orders in that case which were identical in all material respects with the instant Commission orders—containing the same rulings in the same language on the same issues. Here, as in *Convoy*, the Commission's orders specifically refer to the uncontroverted facts in the petitions of Commercial Carriers and Kenosha, to the Commission's prior decision in *NATA* and the criteria there established, and to the *Motor Convoy* decision—thus making amply clear the basis upon which the agency was proceeding.

CONCLUSION

This appeal presents no substantial issue that has not already been decided by this Court in the *Motor Convoy* case and again this Term in the *Convoy* case.

Plenary consideration is not warranted, and the judgment below should be affirmed.

Respectfully submitted.

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FEBRUARY 1966.

APPENDIX

Service Date, December 17, 1964.

ORDER

At a Session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D.C., on the 9th day of December, A.D. 1964.

No. MC–30837

No. MC–30837 (Sub-No. 185)

KENOSHA AUTO TRANSPORT CORPORATION

(Kenosha, Wis.)

It appearing, That Certificates No. MC-30837 dated April 15, 1955, and No. MC–30837 (Sub-No. 185) dated February 15, 1957, were issued to petitioner authorizing operation as a common carrier by motor vehicle, in interstate or foreign commerce, of described motor vehicles and parts from and to the points described in the appendix hereto;

It further appearing, That in its report and order in *National Auto. Transporters Assn.—Declaratory Order, NATA,* 91 M.C.C. 395, (decided October 15, 1963), the Commission *inter alia,* (a) determined that motor carrier holders of "initial" and "secondary" authority to transport automobiles should be placed in a position to be able to continue to participate in the transportation of certain traffic they enjoyed prior to the advent of trailer-on-flatcar and multi-level rail car service, and (b) outlined a procedure

for modifying the certificates and permits of such motor carriers;

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of Kenosha Auto Transport Corporation, filed December 2, 1963, for modification of certificates;

(2) Petition of National Trucking Company, protestant, filed January 27, 1964, for a stay of the proceedings, embracing a petition for consolidation with Ex Parte No. 230 (Sub-No. 1), *Substituted Service-Charges and Practice of For-Hire Carriers of Automobiles;*

(3) Petition of Auto Convoy Co., protestant, filed February 3, 1964, for dismissal of the petition in (1) above, embracing a request for oral hearing;

(4) Reply by United Transports, Inc., protestant to petition in (1) above, filed February 24, 1964;

(5) Reply by Clark Transport Company, protestant to petition in (1) above, filed February 24, 1964, embracing a request for oral hearing;

(6) Reply by Convoy Company, protestant, filed February 25, 1964, for dismissal of the petition in (1) above and for a stay of the proceedings, embracing a request for oral hearing;

(7) Reply by Kenosha Auto Transport Corporation, applicant, filed February 13, 1964, to motions in (2) and (3) above;

and good cause appearing therefor:

We find, That the present and future public convenience and necessity require that Certificates No. MC–30837, dated April 15, 1955, and No. MC–30837 (Sub-No. 185), dated February 15, 1957, which authorize, as here pertinent, the transportation of the commodities described in (1) and (2) of the next succeeding paragraph, in initial movements, in truck-

away service, be modified as set forth in the following paragraph;

It is ordered, That upon full compliance by Kenosha Auto Transport Corporation with the requirements of section 215, 217, and 221(c) of the Interstate Commerce Act and the rules and regulations of the Commission thereunder, Certificates No. MC–30837, dated April 15, 1955, and No. MC–30837 (Sub-No. 185), dated February 15, 1957, be, and they are hereby, modified, by adding to the certificates, the following:

(1) In No. MC–30837, *trucks, truck tractors, chassis, and station-wagon type vehicles on truck chassis* designed to transport passengers and property, with or without bodies and parts thereof, in secondary movements, in truckaway service, over irregular routes, between points in Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming and points in the Upper peninsula of Michigan, restricted to the transportation of vehicles manufactured or assembled at International Harvester Corporation plants at Fort Wayne, Ind., or Springfield, Ohio, which have had an immediately prior movement by railroad; and

(2) In No. MC–30837 (Sub-No. 185), *motor vehicles* (other than automobiles) *and chassis,* in secondary movements, in truckaway service, and parts of, or accessories for such vehicles, when transported therewith, over irregular routes, between points, in Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon,

South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming and points in the Upper peninsula of Michigan, restricted to the transportation of vehicles manufactured or assembled at International Harvester Corporation plants at Bridgeport, Conn., which have had an immediately prior movement by railroad.

It is further ordered, That except to the extent granted above, the petitions and motions, be, and they are hereby, denied and overruled, respectively;

It is further ordered, That if applicant does not comply with the requirements set forth in the second ordering paragraph, within 60 days from the date of service of this order, or within such additional time as may be authorized by the Commission, the petition of applicant considered and disposed of by this order shall stand denied in its entirety, effective upon the expiration of the said compliance time.

By the Commission, Division 1.

[SEAL] HAROLD D. MCCOY, *Secretary.*

Pertinent authority in Certificate Nos. MC–30837 and MC–30837 (Sub-No. 185), sought to be modified.

Irregular Route:

In No. MC–30837—*Trucks, truck-tractors, chassis, and station-wagon type vehicles on truck chassis* designed to transport passengers and property, with or without bodies and parts thereof, in initial movement, in truckaway service, from Fort Wayne, Ind., and Springfield, Ohio, to all points in the United States.

In No. MC–30837 (Sub-No. 185)—*Motor vehicles* (other than automobiles) and *chassis,* in initial movements, in driveaway and truckaway service, and parts of or accessories for, such vehicles, when transported therewith, routes, from Bridgeport, Conn., to points in the United States.

Service Date, December 23, 1964.

ORDER

At a Session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D.C., on the 17th day of December, A.D. 1964.

No. MC–43038 (Sub–No. 404)

COMMERCIAL CARRIERS, INC.

(Romulus, Mich.)

It appearing, That Certificate No. MC–43038 (Sub–No. 404), dated August 1, 1958, was issued to petitioner authorizing operation as a common carrier by motor vehicle, in interstate or foreign commerce, of new automobiles, in initial movements, in truckaway service, from the site of the Cadillac Motor Car Division of General Motors Corporation at Detroit, Mich., to points in Texas;

It further appearing, That in its report and order in National Auto Transporters Assn.—Declaratory Order, NATA 91 M.C.C. 395, (decided October 15, 1963), the Commission *inter alia,* (a) determined that motor carrier holders of "initial" and "secondary" authority to transport automobiles should be placed in a position to be able to continue to participate in the transportation of certain traffic they enjoyed prior to the advent of trailer-on-flatcar and multi-level rail car service, and (b) outlined a procedure for modifying the certificates and permits of such motor carriers;

It further appearing, That by order of March 3, 1964, the Commission, Division 1, denied modification of the above-entitled certificate;

And it further appearing, That in its petition for reconsideration petitioner limits the modification sought to the origin points of Irving and Floydada, Tex.;

Upon reconsideration of the record in the above-entitled proceeding, and of:

(1) Petition of Commercial Carriers, Inc., filed April 20, 1964, for reconsideration of the order of the Commission, Division 1, dated March 3, 1964, denying modification of authority;

(2) Reply by United Transports, Inc., protestant, filed May 1, 1964, embracing a request for oral hearing;

and good cause appearing therefor:

We find, That the present and future public convenience and necessity require that Certificate No. MC–43038 (Sub-No. 404), dated August 1, 1958, be modified as set forth in the next succeeding paragraph;

It is further ordered, That upon full compliance by Commercial Carriers, Inc., with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act and the rules and regulations of the Commission thereunder, Certificate No. MC–43038 (Sub-No. 404), dated August 1, 1958, be modified by adding thereto the following:

New automobiles, in secondary movements, in truckaway service from Irving and Floydada, Tex., to points in Texas, restricted to traffic originating at the site of the Cadillac Motor Car Division of General Motors Corporation at Detroit, Mich., and having an immediately prior movement by rail.

It is further ordered, That the motion in (2) above be, and it is hereby, overruled, for the reason that disposition of the issues involved can be resolved on the basis of the information of record, and no good cause appears at this time for assigning the matter for oral hearing;

It is further ordered, That, except to the extent modification is granted in the immediately preceding

paragraph, the relief sought be, and it is hereby, denied;

And it is further ordered, That if applicant does not comply with the requirements set forth in the second ordering paragraph, within 60 days from the date of service of this order, or within such additional time as may be authorized by the Commission, the petition of applicant considered and disposed of by this order shall stand denied in its entirety, effective upon the expiration of the said compliance time.

By the Commission, Division 1.

[SEAL] HAROLD D. MCCOY, *Secretary.*

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